UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

JACKSON TERRACE ASSOCIATES
Employer[1]

and

MERCEDES BENITEZ, an Individual — Case No. 29-RD-921
and

NATIONAL ORGANIZATION OF
INDUSTRIAL TRADE UNIONS,
LOCAL 72
Intervenor[2]

JACKSON TERRACE ASSOCIATES
Employer

and — Case No. 29-RC-9183

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO
Petitioner[3]

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Tracy Belfiore, a Hearing Officer of the National Labor Relations Board, herein called the Board.

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[1] The Employer's name appears as amended during the hearing. It should be noted that the petitions also name Wen Management and Benjamin Development Contracting. However, all parties agreed that the employing entity is Jackson Terrace Associates.

[2] National Organization of Industrial Trade Unions, Local 72, herein called the Intervenor or NOITU, intervened in the instant proceeding based on a collective bargaining agreement with the Employer.

[3] The name of Local32B-32J, Service Employees International Union, AFL-CIO, herein called 32B-32J, or the Petitioner, appears as amended during the hearing.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned:

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Jackson Terrace Associates, herein called the Employer, a New York partnership, with its principle office and place of business located at 100 Terrace Avenue, Hempstead, New York, herein called the Hempstead facility, is engaged in the ownership and management of a residential apartment complex.[4] During the preceding twelve months, the Employer derived $500,000 in gross annual rental revenues and, during the same period, purchased and received goods, supplies and materials, including heating oil, valued in excess of $5,000 directly from entities located outside the State of New York.

Based on the foregoing, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. During the hearing, the Intervenor and the Employer asserted that their recently executed collective bargaining agreement bars the processing of the instant petitions. Local 32B-32J, and the RD Petitioner, contend that the contract should not be

[4] It should be noted that the petitions indicate the Employer's address as 377 Oak Street, Hempstead, New York. However, the RD Petitioner and the RC Petitioner amended their petitions to reflect the address noted above.

afforded bar quality because its terms have not been implemented.[5] In support of their respective positions, the Employer called its representative, Peter Florey, the Intervenor called its vice president, Peter Pacheco, and Local 32-32J called employee Delano Raheem Thompson. The RD Petitioner also testified.

According to Pacheco, the Employer and NOITU have been parties to collective bargaining agreements since the late 1980s. However, NOITU was first certified by the Board on March 16, 1992. The certification of representative certified NOITU as the collective bargaining representative of the Employer's employees in a unit of "all full-time and regular part-time building service employees, including the superintendent and assistant superintendents, excluding office clerical employees, guards and supervisors as defined in the Act."[6] It appears that there was a collective bargaining agreement covering the unit employees from the 1992 certification until sometime in 1995, when the Employer and NOITU entered into another collective bargaining agreement. In this regard, the record established that on December 18, 1995, the Employer and NOITU entered into a contract, which became effective on January 1, 1996, and expired on

[5] It should be noted that during the hearing, Local 32B-32J attempted to elicit some testimony regarding ratification of the most recently executed memorandum of agreement, which was signed on December 17, 1998, but became effective on December 31, 1998. The hearing officer refused to allow Local 32B-32J's counsel to continue this line of questioning because there was no express provision in either the expired contract, or the recently executed memorandum of agreement requiring ratification as a condition precedent to contract validity. It is well established that when ratification is a condition precedent to contractual validity, the contract is ineffectual as a bar unless it is ratified prior to the filing of a petition. American Broadcasting Co., 114 NLRB 7 (1956); Kennebec Mills Corp., 115 NLRB 1483 (1956). Under this rule, prior ratification by the membership is required only when it is made an express condition precedent in the contract itself. Appalachian Shale Products Co., 121 NLRB 1160 (1958); Merico, Inc., 207 NLRB 101 (1973); International Paper Co., 294 NLRB 1168 fn. 1 (1989). In the instant case, neither the expired contract, nor the recently executed memorandum of agreement contain any express language concerning ratification. As there is no express condition that the contract be ratified in order to be valid, it appears that prior ratification is not required in order to consider whether the successor memorandum of agreement constitutes a bar. Accordingly, I affirm the hearing officer's ruling refusing to allow any questioning in this regard.

[6] Board Exhibit 2.

December 31, 1998.[7] There is no record evidence, nor any contention that this contract was not enforced nor complied with. That contract contains the following provisions: a recognition clause, a schedule of hours with an overtime provision and paid holidays, vacations and sick leave, as well as clauses relating to union security,[8] check-off, discharge, no discrimination policy, mediation and arbitration, safety provisions, work stoppages, military service, reduction in benefits, seniority, savings clause, survival of the contract, shop stewards, union representatives' access, picket lines, pension and welfare funds, remedies for failure to pay funds or dues, and the term of the agreement. The wage provision, at page 10, contains a sentence stating: "On the first and second anniversary dates of this Agreement, all employees covered by the Agreement shall receive an increase of $.40 per hour in wages." Schedule A attached to the contract (which is numbered as page A8), essentially reiterates the earlier provision, by stating, "On the first and second anniversary dates of this Agreement, all employees covered by the Agreement shall receive a forty cents per hour increase in wages." However, Schedule A adds another provision stating, "effective as of the date of this Agreement, all employees covered by the Agreement shall receive a forty cents per hour increase in wages." Thus, looking at the agreement in total, it appears that employees were to receive a wage increase on the date that the contract became effective, and two other wage increases on the first and second anniversary of the agreement. As indicated above, there has been no representation that this contract was not implemented. In this

[7] Intervenor Exhibit 1.

[8] The union security clause states, in pertinent part, that "the Employer shall discharge any employee covered by this Agreement upon receipt of written notice from the Union that said employee is not a member in good standing of the Union (non-payment of dues and/or fees)." The Supreme Court has determined that "membership in good standing" language in a union security clause does not render said clause invalid. See Marquez v. Screen Actors Guild, Inc., 119 S.Ct. 292 (1998). Nor does it appear that the union security clause herein is retroactive in any way.

regard, Intervenor's Exhibit 4A shows that as of December 11, 1998, the Employer remitted the appropriate dues, pension and welfare payments it owed for the month of November 1998.

It appears from the record testimony that sometime in late November 1998, Pacheco met with the unit employees and solicited their proposals and demands for a successor contract. According to Pacheco, the proposals included an increase in wages, paid holidays, an increase in vacation time and pension fund contributions. Employee Thompson claims that the unit employees were concerned with wage increases and an improvement to the medical plan, with no focus on pension increases. In any event, Pacheco and Florey essentially testified that there were two meetings held in December 1998. During the first meeting, there was little accomplished. However, it was during the second meeting, on or about December 17, 1998, that agreement was reached. It appears from the record that bargaining unit employees attended both meetings as members of the negotiating committee. The record established that the document executed on December 17, 1998, referred to herein as the memorandum of agreement, or the MOA, states, in pertinent part:[9]

> This Agreement made and entered into this 17th day of December 1998, by and between [the Employer] and [NOITU]. All conditions in the

[9] It should be noted that there was some contradiction as to the date of the execution of the MOA. Pacheco and Florey testified that they signed the agreement on December 17, 1998, the date that appears on the MOA. However, employee Thompson, who was a member of the negotiating committee, claims that it was not signed until December 18, 19 or 20, 1998. In this regard, Thompson claims that he did not attend the second negotiation session, but subsequently ran into Florey, who indicated that a contract was reached. Thompson claims that Florey represented that the contract was executed on either December 18, 19, or 20th. The RD Petitioner, Benitez, testified that a fellow employee and committee member asked him to attend the negotiating session on December 17, 1998, but, by the time that Benitez arrived, the meeting was over. Benitez claims that he was told by another employee member of the negotiating committee that a "piece of paper," and not a "contract" was signed. There is little significance to the date of the execution in this case inasmuch as the MOA seems to imply that it would take effect ***after*** the prior contract expired on December 31, 1998. As for Benitez's representation that only a "piece of paper was signed," and not a "contract," for the reasons set forth more fully below, I find that the MOA constitutes a bar to the processing of the petition.

> Agreement terminated December 31, 1998, between the above parties shall remain in full force and effect until December 31, 2001, except for the following additions and corrections:
>
> WAGES: $.40 per hour increase upon signing
>
> $.40 per hour increase 1st Anniversary
>
> $.40 per hour increase 2nd Anniversary
>
> *(Company to review employee for the purpose of wage increase)*
>
> TERM: 3 Year agreement
>
> HEALTH & WELFARE: As per contract rate
>
> PENSION: $5.00 per month increase[10]

The MOA was executed by Pacheco, Florey and two bargaining unit employees who were members of the negotiating committee. The record established that on December 28, 1998, the Employer's president, sent a memo to Rosalie Guinto, the payroll clerk, attaching the December 17, 1998, MOA and stating, "Please implement the 40 cent increase and other provisions in accordance with the memorandum."[11] It is undisputed by all parties that employees were supposed to receive a 40 cent increase ***immediately*** upon execution of the MOA. It is also undisputed that, as of the date of the hearing, the employees did not receive their 40 cent wage increase, although Florey

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[10] See Intervenor Exhibit 2 and 3. It should be noted that there are actually two MOAs. They are identical, except that Exhibit 3 contains some handwritten notes in the pension section and miscellaneous section. In this regard, the pension section on both exhibits notes the $5.00 per month increase, but, on Exhibit 3 there is a notation "1/2/99 pension $35 per month." NOITU's witness explained that said notation was made by the Union's secretary, for the purpose of noting that the $5.00 increase now totals $35 per month to be remitted by the Employer. Thus, it is simply a calculation made by the Union, reflecting the parties agreement.

There is also a notation in the miscellaneous section on Exhibit 3 that does not appear on Exhibit 2. The notation says, "Dues increase $1.60: $21.40 dues effective 1/1/99." NOITU's witness explained that a dues increase is not a matter of negotiation between the parties. Rather, it is determined by the Union, pursuant to its constitution and bylaws requiring a dues increase when there is a wage increase. Accordingly, after the Employer and NOITU executed the MOA, the Union made the calculation that, based on the wage increase, the new monthly dues amounted to $21.40 per month.

[11] Employer Exhibit 1.

testified that the Employer has every intention to ensure that all employees receive it. Florey claims that he did not know that the wage increase was not implemented, but claims that when he contacted the payroll clerk on the day of the hearing, she claimed that the holiday schedule, her vacation, and "year end" matters caused her to overlook the implementation of the wage increase and that she planned on implementing it immediately.[12]

There was also some testimony concerning the language in the MOA stating that the "company is to review employees for the purpose of wage increases." Both the Employer's and NOITU's representatives testified as to the intent and meaning of that phrase and how it applies to the 40 cent increase. Both Pacheco and Florey confirm that the 40 cents outlined above was a guaranteed wage increase for each employee in the unit, regardless of merit. However, Pacheco testified that some of the employees were complaining that they had more duties and responsibilities than others. Thus, some of the employees requested that they be reviewed on an individual basis. Pacheco proposed the idea to Florey who agreed to it. Florey confirmed that NOITU requested that the Employer, "on a voluntary basis," review employees whose wages fell below the

[12] With respect to Florey's knowledge of the failure to implement the wage increase, the record established that Pacheco telephoned Florey on two occasions, once in December 1998 and once in January 1999, leaving messages on both occasions. Florey admits to having received both messages and that the first message, left sometime in late December 1998, concerned the wage increase. As indicated above, Florey requested that the payroll clerk implement the increase, and he assumed that she did so, when he received no other inquiries regarding it. In this regard, Florey denies that Pacheco left a second message for him in January 1999, nor is it clear that any such message was sufficiently detailed to conclude that Pacheco was calling about the wage increase. In any event, Florey claims that there were no complaints regarding the wage increase, thus, he assumed that it had been implemented. Employee Thompson testified that when he did not receive his increase, he did not call Florey directly. Instead, he spoke to his immediate supervisors, a superintendent named Mark (LNU) or a manager named Lisa (LNU). Thompson told these individuals that he had not yet received the increase. Mark and Lisa told Thompson that they would "make a call" about it, but Thompson did not know to whom they spoke. Overall, it appears from the record that Florey was made aware that the increase was not implemented, and, by virtue of his memo to the payroll clerk, attempted to have it put into effect. Florey has also represented, as indicated above, that the increase will be implemented.

average wage rate and consider additional increases for them. In this regard, Florey testified that he granted such an increase to employee Thompson, who received an hourly increase of approximately $2.00.[13] In sum, the evidence shows that the Employer and NOITU agreed that the 40 cent increase was applicable to everyone upon signing of the MOA, the employees were to receive an additional 40 cents for the first and second years, and the Employer maintained the right to review employees for the purpose of ***additional*** wage increases, above and beyond the 40 cent increases.

The record also established that on December 18, 1998, one day after execution of the MOA, NOITU send a fund remittance report to the Employer, asking the Employer to remit dues, pension and welfare funds for the month of December 1998. The document reflects the $5.00 increase in pension and the increase in dues, as required by the MOA, while the welfare fund remained the same as the expired agreement.[14] This document tends to show that the NOITU and the funds immediately implemented the terms of the MOA, albeit prematurely, by billing the Employer for the increase payments in December 1998, rather than in January 1999, when the MOA took effect. It is clear from the record that the Employer has not remitted the dues or the pension or welfare fund payments. Florey testified that he did not know why those payments were not remitted as of the hearing date, but that he has every intention of making the appropriate payments.

[13] Thompson confirms that he was told by Florey that he was supposed to receive the $2.00 increase, but that he had not yet received either his 40 cent increase or the $2.00 increase.

[14] Intervenor 4B.

Local 32B-32J and the RD Petitioner contend that the MOA should not be afforded bar quality inasmuch as the wage increase has not been implemented,[15] the Employer has not paid the appropriate payments to the pension and welfare funds, nor has the Employer remitted dues on behalf of the unit employees. I reject these arguments and find that the proffered contract bars the processing of the instant petitions for the following reasons.

It is well established that the contract bar doctrine provides that when contracting parties have executed a collective bargaining agreement, they are entitled to a reasonable period of time during which a question concerning representation cannot be raised thereby preserving the stability that flows from such an agreement. General Cable Corp., 139 NLRB 1123 (1962). However, postponement of employee rights during the life of a contract is imposed only when the contract is a lawful one, which clearly covers the petitioned-for employees in an appropriate unit, sets forth substantial terms and conditions of their employment, and which has been applied to the covered employees.[16]

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[15] Local 32B-32J refers not only to the 40 cent increase to all employees, but the additional monies granted to Thompson, who has not yet received his increase.

[16] Regarding the unit covered by the MOA, it should noted that the RC and RD petitions set forth different unit descriptions, while the contract between NOITU and the Employer sets forth an entirely different description of the classifications in the unit. And, the 1992 certification issued by the Board contains a unit description that differs from any of the above described units. In this regard, the 1992 certification describes the unit as all full-time and regular-part time building service employees, including the superintendent and assistant superintendents, excluding office clerical employees, guards and supervisors. The 1996 through 1998 NOITU contract describes the unit as "all employees, i.e., production, maintenance, shipping and receiving employees, plant clerical employees, and truck drivers, excluding office clerical employees, foremen, watchmen, guards and supervisors as defined in the Act." Florey testified that the Employer does not employ any "production employees, plant clericals or truck drivers," as mentioned in the contract unit, but it does employ shipping and receiving employees, handymen, superintendents, assistant superintendents, porters and painters, all of whom have been covered by the contract. The unit described in the RD petition seems to loosely conform with the unit described by Florey, as it petitions for "all full-time and regular part-time porters, carpenters, painters and maintenance employees employed by the Employer, excluding all other employees, guards and supervisors as defined in the Act." To confuse matters further, Local 32B-32J, in its RC petition, seeks to represent "all full-time and regular part-time building service employees employed by the Employer, excluding guards and supervisors as defined in the Act," which does not conform with the NOITU contract unit, or with the 1992

It appears from the instant case that, on their face, there is nothing unlawful about the MOA or the preceding contract. In my view, the MOA also contains substantial terms and conditions of employment for the petitioned-for employees. The MOA incorporates, by reference, most of the terms of the expired contract, except for the noted changes to wages and pension. I note that it is well established that a contract which has not been applied to the employees covered "does not establish the existence of a stabilizing labor agreement which bars a representation election." Tri-State Transportation Co., Inc., 179 NLRB 301, 311 (1969). In the instant case, the only issue raised by the two Petitioners concern the Employer's failure to: (1) timely implement the 40 cent an hour wage increase to all unit employees; (2) implement the additional $2.00 increase to Thompson; and (3) remit dues, pension or welfare payments. However, it seems clear from the record that the Employer's failure to implement the wage increase was merely an oversight, and there were attempts prior to the filing of the instant petitions (i.e., the December 28, 1998, memo to the payroll clerk), and subsequent attempts to implement the wage increase and the pension increase. Further, as for the pension, welfare and dues payments, it appears from the record that the Employer has always made these payments in a timely fashion and, while the January 1999, payments may have been slightly delayed, the Employer has indicated its readiness to fulfill its obligations in this regard. I find the Board's decision in Visitainer Corp., 237 NLRB 257 (1978), to be instructive here. In that case, the regional director refused to give bar quality to a contract where some of the employees were paid 5 cents less than the contractual minimum hourly rate, some were paid more than said rate, night shift

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certification. Despite the somewhat different unit descriptions, there appears to be no dispute that the MOA and its predecessor contracts have covered those petitioned-for employees.

employees did not receive the bonus required, and those who worked on Thanksgiving did not receive holiday pay. The Board concluded that, despite these deviations from the application of the contract, there was no evidence that the contract had been abandoned or that "the actual wages, hours and working conditions at the plant are so at variance with the contract terms as to remove the bar quality from the contract." The Board noted that there was substantial compliance with many of the contract terms and any breaches may be subjects for the grievance procedure, which had been successfully used in the past. In the instant case, I note that, but for the Employer's failure to timely implement the wage and pension increase, the Employer has substantially, if not completely, complied with all other terms and provisions that have been extended pursuant to the MOA. And, as indicated above, the Employer has made unsuccessful efforts to implement the changes incorporated in the MOA and has indicated its intention to comply with its requirement to implement the wage increase and make the pertinent fund payments. In finding that the MOA has bar quality, I also note the longstanding and stable collective bargaining relationship that existed between the Employer and NOITU since the late 1980's. In light of all of the above, I find that the MOA effective December 31, 1998, through December 31, 2001, bars the processing of the instant petitions and warrants dismissal thereof.

It is hereby ordered that the petitions in Case Nos. 29-RC-9183 and 29-RD- 921 be dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C., 20570. This request must be received by February 24, 1999.

Dated at Brooklyn, New York, this 10th day of February, 1999.

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